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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

MARY W. McELWAIN, Petitioner

v.

COUNTY OF FLATHEAD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITION FOR WRIT OF CERTIORARI

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PROOF OF SERVICE

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I, Marshall Murray, a member of the Bar of the Supreme Court of the United States and counsel of record for Mary W. McElwain, Petitioner herein, hereby certify that, pursuant to Rule 29.5, Rules of the Supreme Court, I served three copies of the attached Petition for Writ of Certiorari on the Respondent herein, as follows:

On the County of Flathead, Respondent herein, by depositing such copy in the United States Post Office, Kalispell, Montana, with first class postage prepaid, properly addressed to the post office address of Thomas J. Murphy, the above-named Respondent's counsel of record, at P.O. Box 2048, Great Falls, Montana 59403, (406) 727-9270.

All parties required to be served have been served.

DATED September 30, 1991.

MURRAY & KAUFMAN, P.C.

By: MARSHALL MURRAY

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QUESTIONS PRESENTED FOR REVIEW

1. Do septic regulations which prevent a landowner from constructing a home and thereby diminish the value of the landowner's property to one-third of its pre-regulation value without evidence that the regulations substantially advance the public interest in health constitute a taking of property for which just compensation is required by the Fifth Amendment to the United States Constitution?

2. The Supreme Court of Montana held in its decision in this case that the trial court's finding that a land use regulation was "reasonably adapted" to the purpose of protecting public health was equivalent to a finding that the regulation "substantially advances" a legitimate public purpose. The second question thus presented is:

Is a finding that land use regulations are "reasonably adapted" to a public purpose equivalent to a finding that such regulations "substantially advance" a public purpose as set forth in *Agins v. Tiburon*, 447 U.S. 255 (1980) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)?

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OPINION BELOW

The Supreme Court of Montana has issued an opinion in this case entitled *McElwain v. County of Flathead*, a copy of which appears in Appendix A to this Petition, at page 1. The case has not been officially reported, but appears unofficially at 811 P.2d 1267 (Mont. 1991).

JURISDICTION

The Supreme Court of Montana entered judgment by remittitur to the Clerk of the Montana Eleventh Judicial District Court on July 9, 1991. The Supreme Court of Montana denied a motion for rehearing on July 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND REGULATIONS

This case involves the property clause of the Fifth Amendment to the United States Constitution, which reads as follows:

". . . nor shall private property be taken for public use, without just compensation."

It also involves Section 9.2(5)(a) of sewage treatment system regulations adopted by the Flathead City-County Board of Health effective May 1, 1988, a copy of which appears at Appendix E to this Petition, at page 1.

STATEMENT OF THE CASE

In 1979 the Petitioner Mary McElwain purchased property along the Flathead River in a rural area in northwest of Montana. She intended to construct a home for herself and her husband approximately 200 feet from the bank of the river. No State of Montana or Flathead County regulation in effect at the time of purchase would have prevented her from constructing her home as intended.

Following Mrs. McElwain's purchase of property, the County adopted sewage treatment system regulations effective January 20, 1983. Section 8.2D of those regulations required all septic system drainfields to be set back a minimum of 100 feet from a 100 year floodplain as delineated by floodplain maps accepted for use in the County. On August 6, 1984 the

County Board of Commissioners adopted Resolution No. 522 adopting by reference a flood insurance study which identified the 100 year flood plains within the County. The flood insurance study included the McElwain property within the 100 year flood plain boundary, but was subsequently amended to show that part of her property was not within with flood plain.

Mrs. McElwain applied for a septic system permit in August of 1984. The County sanitarian denied her application by letter dated November 7, 1986, citing Section 8.2D of the sewage treatment system regulations. On May 1, 1988 the County adopted revised sewage treatment system regulations which in Section 9.2(5)(a) authorized variances for treatment systems within 100 feet of the 100 year flood plain boundary, provided that the bottom of the proposed drainfield was elevated to no less than four feet above the 100 year flood elevation.

In anticipation of the revised regulation, the County Sanitarian advised Mrs. McElwain by letter dated April 22, 1988 that the only building proposal that he would permit would involve elevating her entire house to allow for gravity flow into an elevated drainfield, the bottom of which would

be at least four feet above the 100 year flood elevation. Mrs. McElwain did not choose to construct her home and drainfield on large mounds as the sanitarian's proposal would have required and accordingly the County denied her request for a variance.

Mrs. McElwain exhausted her state administrative remedies and filed an action for inverse condemnation in the state trial court. Her initial pleading in the trial court alleged that the County's actions in denying the septic permit for her property "have taken and damaged the plaintiff's property without just compensation."

The trial court found that the regulations enacted by the County since Mrs. McElwain purchased her property constituted a "servitude" upon the property which diminished its value from $75,000 before the regulation to $25,000 after the regulation. However, the trial court denied compensation to Mrs. McElwain on the rationale that the regulations were "reasonably adapted" to the purpose of protecting public health and impaired her property rights only to the extent "reasonably necessary". Thus, in the trial court's judgment, the regulations did not constitute a compensable "taking" of private property.

Mrs. McElwain appealed the judgment of the trial court to the Supreme Court of Montana. Her opening brief argued that the County regulations constituted a taking of property compensable under both the Montana and United States constitutions.

The Supreme Court of Montana divided four to one on the issue of whether the imposition of setback regulations constituted a taking of private property for which Mrs. McElwain must be compensated under either the United States Constitution or the Montana Constitution. The majority held that it did not. It ruled first that the test applied by the trial court, that the regulation was "reasonably adapted" to the purpose of protecting public health, was the same as the "substantially advances a public purpose" test applied by this Court in Fifth Amendment property clause cases. It went on to hold that the regulation was presumed to be reasonable, and that the testimony supported the conclusion that it was reasonable. Finally, it held that because Mrs. McElwain could still make some use of her property, although not its originally intended use, she was not entitled to compensation.

The dissenting justice noted that the County submitted

no evidence of a scientific basis for the regulation, and that in particular it showed no evidence why a 100 year flood plain boundary was relevant to public health. "Adoption of a rule relating to a theoretical boundary, without reference to any studies showing danger to waters, is arbitrary and capricious. No issue of public health is presented."

A copy of both the majority and dissenting opinions appears at Appendix A. Mrs. McElwain's petition to the Supreme Court of Montana for rehearing was denied on July 2, 1991 and a remittitur of judgment was entered on July 9, 1991.

REASONS FOR GRANTING THE WRIT

The Petitioner, Mary McElwain, seeks review on writ of certiorari pursuant to Supreme Court Rule 10.1(c), on the ground that the highest court of Montana has decided a federal question in a way that conflicts with applicable decisions of this Court.

As found by the trial court, the setback regulations adopted by the County constitute a substantial servitude on Mrs. McElwain's land, preventing her from making use of

the land as a site for her home. From a financial perspective, the land is worth only one third of its pre-regulation value. Yet, as noted by the dissenting justice of the Montana supreme court, the County presented no factual basis to support the need for its setback regulations.

The trial judge, apparently sensing the lack of any scientific or factual basis upon which the County determined that a setback of 100 feet from the elevation designated as a 100 year flood plain, questioned the County's witness, the sanitarian who denied Mrs. McElwain's septic permit:

> THE COURT: I am curious. You have indicated, and that is the key to this case, as far as I am concerned, what data was relied upon, if you know, to determine the 100-foot setback was appropriate, reasonable, not arbitrary, capricious.
>
> THE WITNESS: I can explain the reasoning. I can't specifically cite specific studies that were relied upon.

Tr. p. 339, line 21 through p. 340, line 3.

The witness then explained the water purifying effects associated with movement through the soil, concluding that micro-organisms are removed through 100 to 150 feet of soil. The court again inquired whether a study had been done on Mrs. McElwain's property or any other property in Flathead County to demonstrate that the 100 foot setback would protect public health. Again, the witness testified that he knew of no such studies. Tr. p. 341, lines 13-23.

Finally, lacking citation to any scientific studies or data to support the 100-foot setback, the court inquired of the witness whether in his own mind there was a rational, reasonable basis for the regulation:

> THE COURT: My concern is this, and you didn't draft these regulations, so my concern is the arbitrary nature of the regulations. And I am trying to determine if there is a rational, reasonable basis for the regulations, or if they are arbitrary. I gather you are satisfied in your mind there is a rational, reasonable basis for them?
>
> THE WITNESS: Yes.

Tr. p. 344, lines 6-13.

This Court has ruled that a land use regulation does not constitute a taking for which the Fifth Amendment requires payment of just compensation to a property owner only if the regulation meets two tests. First, the regulation must "substantially advance a legitimate state interest". Second, the regulation must not deny the owner of "economically viable use" of the affected property:

> We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land."

Nollan v. California Coastal Commission, 483 U.S. 825, 834, 97 L.Ed.2d 677, 687, 107 S.Ct. 3141 (1987), citing *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

In its discussion of these tests, this Court has also made plain that they are more stringent than the "rational basis" tests applicable to equal protection and due process claims:

> [O]ur opinions do not establish that these standards are the same as those applied to due

> process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, Agins v. Tiburon, 447 U.S. 255, 260, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective. . . .

Nollan v. California Coastal Commission, supra, 483 U.S. at 834, n. 3. (Emphasis in original)

Notwithstanding these statements of the applicable principles, Mrs. McElwain's case has been decided under a bewildering array of "verbal formulations" derived from a combination of state and federal decisions. The trial court's questioning of the County's witness elicited the response that the regulation was "rational" or "reasonable" rather than "arbitrary". The trial court's opinion determined (notwithstanding the lack of evidence of any studies supporting a 100 foot setback from 100 year flood elevations) that the setback requirement was "reasonably adapted" to the protection of public health and that it "impaired" Mrs.

McElwain's property rights no more than "reasonably necessary."

The Supreme Court of Montana, relying on its previous decisions rather than adhering to the *Agins* and *Nollan* tests, held that a finding that a regulation is "reasonable" means the same thing as finding that it "substantially advances" a public purpose. 811 P.2d 1267, 1270. Over the objection of the dissenting justice, the majority of the court went on to apply a presumption in favor of the validity of regulatory legislation to hold that no compensation was due to Mrs. McElwain for the regulation which prevents her from building her home on the site she purchased for that purpose, citing this Court's holding in *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962).

In *Nollan, supra*, this Court specifically rejected the analysis set forth in *Goldblatt v. Hempstead*, in which the land use regulation was presumed valid unless shown that it was not "reasonably necessary for the accomplishment of the purpose." 369 U.S. at 595. It was incorrect for the Montana supreme court to rely upon a presumption of validity because the issue under the takings clause is not the validity of the

regulation, but whether the landowner is entitled to compensation:

> But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt v. Hempstead, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.*

483 U.S. at 835, n. 3. (Emphasis added)

As a consequence of the Montana courts' application of inappropriate standards to review her claim, Mrs. McElwain has been deprived of the intended use of her property by a local government which has submitted no evidence to show that its requirement of 100 foot setbacks

from 100 year flood elevation boundaries substantially advances a legitimate state interest in public health. Although this Court has clearly elaborated the applicable "takings" tests under the Fifth Amendment, the Montana supreme court in this case failed to hold the local government to those tests. It held instead that a witnesses' opinion that regulations are "rational" and not "arbitrary" is sufficient to support a finding that the regulations are "reasonably adapted" to the protection of public health and that such a finding is of "equal merit and significance" to a finding required by this Court's decisions that land use regulations "substantially advance" a legitimate state interest and not deprive the landowner of economically viable use her land. 811 P.2d 1267 at 1270.

CONCLUSION

WHEREFORE, Petitioner Mary McElwain prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Montana in *McElwain v. Flathead County*, 811 P.2d 1267 (Mont. 1991).

APPENDIX

A. Opinion of the Supreme Court of Montana in *McElwain v. County of Flathead*, 811 P.2d 1267 (Mont. 1991) 17

B. Opinions of the Montana Eleventh Judicial District Court, in *McElwain v. County of Flathead*, Case No. DV-88-344A:

1. Findings of Fact and Conclusions of Law dated March 2, 1990 35

2. Order dated May 9, 1990 51

C. Order of the Supreme Court of Montana dated July 2, 1991 denying Mary McElwain's Petition for Rehearing 57

D. Order of Remittitur from Supreme Court of Montana dated July 9, 1991 directing entry of judgment pursuant to Rule 16, Montana Rules of Appellate Procedure 59

E. Section 9.2(5)(a), Flathead County, Montana Regulations for Sewage Treatment Systems . . . 61

A.

No. 90-377

IN THE SUPREME COURT
OF THE STATE OF MONTANA

1991

MARY W. McELWAIN, Plaintiff and Appellant,

-vs-

THE COUNTY OF FLATHEAD, a political subdivision of the State of Montana, Defendant and Respondent.

Submitted on Briefs: Nov. 15, 1990

Decided: May 2, 1991

Justice William E. Hunt, Sr. delivered the Opinion of the Court.

Plaintiff and Appellant, Mary McElwain, appeals the judgment of the District Court, Eleventh Judicial District, Flathead County, denying her claim for damages for the reduction in value of her property caused by the enactment of septic regulations by Flathead County. The District Court, sitting without a jury, held that the regulations served a legitimate State interest in protecting the health and safety of the public, and that appellant was not entitled to any compensation. We affirm.

The issue on appeal is whether the District Court erred in finding that the regulations imposed on appellant's property did not constitute a taking of property.

Appellant purchased approximately fourteen acres of real property along the Flathead River in 1979 for the purpose of building a home in which to retire. At the time of the purchase, the property was subject to the 1975 county regulations for subsurface sewage treatment systems. These regulations made it unlawful to construct or alter an individual sewage system within Flathead County without first obtaining a valid permit for the specific construction proposed. The regulations further set forth a setback requirement of 100 feet from the Flathead River, as well as other requirements dealing with septic tank capacity, minimum absorption area standards, and quality of material

used for construction of the system. Nowhere in the 1975 regulations is there a setback requirement from the 100-year floodplain. The appellant would have been able to build her home substantially as originally contemplated, with a 200 foot setback from the edge of the Flathead River, without violating any of the 1975 regulations.

On August 6, 1984, Flathead County adopted a resolution known as the Flathead County Flood Plain Regulations, and official flood plain maps which showed appellant's property to lie within the 100-year flood plain. These 1984 regulations required a 100-foot setback between the septic system drainfield and the flood plain. On August 23, 1984, appellant applied for a permit to install a below-ground septic system on the property in order to begin construction of the retirement home. Her application was denied on the grounds that all of her property was in or within 100 feet of the 100-year flood plain as designated by the flood plain maps. On July 21, 1986, after appellant had hired a civil engineer to prove that a portion of her property was outside the flood plain, the Flathead County Flood Plain Manager agreed that a portion of the appellant's property did in fact lie outside the flood plain.

Appellant reapplied for a below-ground septic system permit on November 6, 1986. The application was denied on

the basis that a 100 foot setback between the septic system drainfield and the 100-year flood plain could not be attained on the appellant's property. Appellant's drainfield as proposed would be 80 feet from the flood plain. Her request for a twenty foot variance was denied by the county on May 13, 1988. Flathead County advised appellant that the only proposal that may be permitted would be a mounded septic system.

Testimony at trial revealed that the home initially contemplated by appellant was a three-bedroom home and that a properly designed drainfield for a three-bedroom home could have been configured to fit within appellant's property without violating the 100-foot setback from the flood plain requirement and without the need for a mounded septic system. The plains denied by Flathead County contemplated a drainfield for a four-bedroom home.

Appellant appealed the denial of her variance request through the entire administrative process before pursuing this action in District Court. No issue as to the appropriateness of the denial of the variance has been raised.

The sole issue on appeal is whether the District Court erred in finding that the reduction in value of appellant's property is not a taking for which compensation is due.

Before we can directly address this issue, however, a

brief discussion of the proper standard to be used in police power actions where "takings" challenges are raised is necessary.

The United States Supreme Court has wrestled with the question of what the proper standard should be in police power actions for quite some time. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648, the Court said,

> [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injures caused by public action be compensated by the government.

The Court settled on a standard that states if the regulation is "substantially related to the promotion of the general welfare," it does not constitute a taking. *Penn Central*, 438 U.S. at 138, 98 S.Ct. at 2666, 57 L.Ed.2d at 657. The Court added a second half to this standard, requiring that the owner not be denied "economically viable use" of his or her land. *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112. This is the standard currently used by the United States Supreme Court in examining taking challenges. *Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 107 S.Ct. 3141, 97

L.Ed.2d 677. See also, *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987), 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472.

Previous opinions by this Court have applied a standard of reasonableness to the question of whether a taking has occurred when a land-use regulation is imposed through an exercise of police power. *Yellowstone Valley Electric v. Ostermiller* (1980), 187 Mont. 8, 15, 608 P.2d 491, 496; *Western Energy Co. v. Genie Land Co.* (1987), 227 Mont. 74, 78, 737 P.2d 478, 481. We have stated that a regulation adopted through an exercise of police power must be "reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare." *Yellowstone Valley Electric*, 187 Mont. at 15, 608 P.2d at 496.

Although "reasonable" is the language this Court has applied to our analysis of taking issues, it is nonetheless a standard of equivalent merit and significance to the federal standard of "substantial." As the United States Supreme Court points out in *Nollan*, 483 U.S. at 835, 107 S.Ct. at 3147, 97 L.Ed.2d at 688, the standards to be applied to taking challenges are not the same standards as those applied to due process or equal protection claims. "Reasonableness" as used in the former situation does not necessarily carry the

same distinction from "substantial" as it does when used in the latter situations.

We applied our standard of reasonableness to a taking issue in *Western Energy Co.*and held that the statute in question did not meet the standard. There we said "the means chosen to advance the interest must be *reasonable*," and yet several paragraphs later stated, "[t]he statute does not bear the requisite '*substantial* relation to the public health, safety, morals, or general welfare.'" (Emphasis added; citations omitted.) *Western Energy Co.*, 227 Mont. at 78, 737 P.2d at 481. (See also *Anderson Insurance v. City of Belgrade* (Mont. 1990), 803 P.2d 648, 47 St.Rep. 2287, where this Court used "reasonable" and "substantial" in like context. Therefore, to clarify this standard and further conform with the federal standard we expressly state that the question to determine whether a land-use regulation is properly invoked is whether the regulation is substantially related to the legitimate State interest of protecting the health, safety, morals, or general welfare of the public, and utilizes the least restrictive means necessary to achieve this end without denying the owner economically viable use of his or her land.

Appellant contends that the regulation fails to meet either part of this standard. Appellant argues that the

regulation fails to satisfy the first part because it does not substantially advance the legitimate State interest in public health in the Flathead River Basin. In support of this argument appellant contends that the county has failed to demonstrate that the 100-foot setback requirement from the flood plain would be any more effective than a lesser distance. Appellant maintains that the county has not presented any evidence or scientific data that would allow the court to determine that a 100-foot setback from a flood plain is necessary to *substantially* advance the States's interest in keeping sewage out of the river.

There are several shortcomings in this reasoning. The first is appellant's assertion that the District Court applied the incorrect standard. Appellant contends that the issue is not whether the regulation is reasonable, as the District Court found, but whether the regulation substantially advances public health. As we stated above, the terms "reasonable" and "substantial" have been used by this Court and the United States Supreme Court interchangeably in the context of police power actions and taking challenges for many years. The District Court relied on the previous opinions by this Court that contain the language "reasonable," and the standard as read from these opinions is the correct standard.

A second flaw in appellant's position is her belief that

the county maintains the burden of proving that the regulation meets the necessary standard.

The District Court found that appellant had failed to overcome the presumption that the regulations as adopted were reasonable. Appellant asserts that the District Court erred in relying on *Whistler v. Burlington Northern Railroad Co.* (1987), 228 Mont. 150, 741 P.2d 422, to reach this conclusion. Appellant insists that such a presumption is inapplicable to this case, and it is the county that must demonstrate the regulation is substantially related to a legitimate State interest. It is her contention that *Whistler* does not apply because the plaintiffs in *Whistler* were requesting that an administrative order be declared unlawful, and in this case appellant is not challenging the legality of the regulation, but rather is seeking compensation under the Fifth Amendment.

The presumption of validity spoken of in *Whistler* refers to the general rule that all legislative enactments are presumed valid and the burden of proving their invalidity is on the plaintiff. *Reeves v. Ille Electric Company* (1976), 170 Mont. 104, 109, 551 P.2d 647, 650. This principle is equally applicable in cases where the legislation in issue is an exercise of the police power, as in this case. *Goldblatt v. Hempstead* (1962), 369 U.S. 590, 596, 82 S.Ct. 987, 991, 8

L.Ed.2d 130, 135. Therefore, this presumption is indeed applicable to the land-use regulation before us.

Appellant's argument that appellant is not seeking a declaration that the regulation is invalid, as was the situation in *Whistler*, appears to be an attempt to distinguish *Whistler* based solely on the fact that appellant is seeking a different remedy.

If a regulation is not properly invoked under the police power and is found to constitute a taking, the remedies available to the government include abandoning its position and discontinuing the regulation or compensating the landowner for the taking. *First Lutheran Church v. Los Angeles County* (1987), 482 U.S. 304, 317, 107 S.Ct. 2378, 2387, 96 L.Ed.2d 250, 265. It is when the government insists on retaining a regulation notwithstanding the fact it constitutes a taking that compensation will be required. Appellant is requesting this latter remedy and appears to have no interest in seeking to have the regulation declared invalid. Appellant is nevertheless challenging the regulation on the grounds of an unconstitutional taking, and requesting compensation as a remedy, rather than declaring the regulation invalid, cannot serve to distinguish *Whistler* The burden of proof lies with appellant and appellant cannot expect to shift this burden of proof over to the county by

merely requesting a different remedy.

A review of the record shows the evidence supports a finding that the regulation is substantially related to the legitimate State interest of protecting public health and safety. Requiring a reasonable distance between sewage drainfields and the 100-year flood plain in order to allow adequate soil cleansing of the sewage prevents the public from the endangerment of sewage contaminants. The testimony supported a conclusion that 100 feet was a reasonable distance. In the event of a 100-year flood this regulation helps make certain the river will still be adequately protected from septic systems that comply with these regulations. It is appellant who has failed to show that some distance less than 100 feet would be just as effective in cleansing the sewage. The facts here as applied to the standard to be met indicate a clear substantial relation to the interest of preventing water contamination.

Appellant's contention that current regulations do not protect the public from sewage contamination in any event, and therefore, the enforcement of the regulation cannot possibly serve to advance the State interest in public health, is unpersuasive. Two wrongs have never made a right and do not do so now. The fact that contaminants may currently be entering the river does not prevent the county from initiating

measures to help retard and attempt to eventually stop these problems.

Appellant argues that the regulation in question has failed to satisfy the second part of the standard as well. Specifically, appellant contends that the diminution in value of the property from $75,000 to $25,000, clearly meets the constitutional standard of loss of economically viable use.

Appellant cites *Knight v. City of Billings* (1982), 197 Mont. 165, 642 P.2d 141, in support of her argument that diminution in value of two-thirds is of sufficient constitutional magnitude to constitute a taking. However, past decisions that have found land-use regulations substantially related to the State interest of public health, safety, and general welfare have rejected the argument that diminution in property value by itself establishes a taking. *Penn Central*, 438 U.S. at 131, 98 S.Ct. at 2663, 57 L.Ed.2d at 653. Diminutions in value of amounts much greater than the two-thirds found here have been held not to constitute a taking. See *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303; *Hadacheck v. Sebastian* (1915), 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348. The issue of economic viability must be resolved by focusing on the remaining use available to the landowner and the nature of the interference with the overall rights in the property, in addition to any reduction in value.

Keystone Coal, 480 U.S. at 497, 107 S.Ct. at 1248, 94 L.Ed.2d at 496. In a careful reading of *Knight*, it is evident that the conclusion reached in that case was based on consideration of these other factors, not solely on the 20 to 30 percent reduction in property value that had occurred.

In view of these additional factors appellant fails to show she has been deprived of the economically viable use of her property. The evidence indicates appellant is still able to utilize the property for the purposes originally intended, that of building [a] home in which to retire, although not as near the river as appellant would have liked. The evidence also reveals the fact that other options are available to appellant. A mounded septic system could be constructed which would allow the appellant more discretion in a building site. The 100-foot setback rule apparently does not apply if a four-foot vertical separation can be achieved between the bottom of the drainfield and the 100-year flood elevation. This vertical separation can be created through a mounded system.

We hold that the public interest involved here outweighs the encroachment upon appellant's property. As was stated in *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322, 325:

> Government could hardly go on if to some extent values incident to property could not be diminished

without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

The land use regulation in question has been properly invoked under the police power of the State.

Affirmed.

/s/William E. Hunt, Sr.
Justice

We concur:

/s/ Diane G. Barz

/s/ R.C. McDonough

/s/ John Conway Harrison

Justice John C. Sheehy (retired, but called to participate) dissenting:

This is a "taking" case; that is, the issue on appeal is whether the plaintiff's property has been inversely condemned

for a public use, which requires the payment to plaintiff of just compensation under federal and state constitutions.

As the state and local regulations are applied in this case, I find a "taking" of private property by the public has occurred, and so I dissent.

There is no dispute as to the damages done to the plaintiff's property. The findings of the District Court (No. 18) show that "plaintiff has suffered damages to her property of a permanent and irreparable nature by means of the diminution of value of the property, based upon fair market value, in the sum of $50,000.00." These damages, the District Court found, resulted from the adoption and imposition on plaintiff's property of the limitations and servitude of the regulations. The damages represent approximately two-thirds of the fair market value of plaintiff's property without the servitude and limitations.

Such damages must be compensated by the public authority unless, as the majority say, (1) the land-use regulation is substantially related to the governmental interest of protecting the public health, and (2) the regulation utilizes the least restrictive method to achieve that end without denying the owner economically viable use of the land. The regulation, and its application here, do not meet either prong of the standard.

The District Court founded its decision on a finding of fact that the activity prohibited, i.e., a septic stem within 100 feet of the 100-[year] flood plain, would be injurious to the health and safety of the community. The evidence in this record is completely lacking that the regulation (1) is substantially related to the state's interest in protecting public health, and (2) is the least restrictive method to attain that end.

The original regulation (the 1975 rules) required the septic system to be set back 100 feet from the stream. This provision agreed with the later-adopted 1980 Environmental Protection Agency Design Manual. That manual sets out a 100-foot distance from water supply sources such as wells, surface water, springs, and so on, but makes no reference at all to 100-year flood plain boundaries. To justify such a rule, the record should show some degree of scientific study on which to base the need or a health basis for the flood plain set-back. None appears here. All other 100-foot space rules are related to some source of potable water. Adoption of a rule relating to a theoretical boundary, without reference to any studies showing danger to waters, is arbitrary and capricious. No issue of public health is presented.

To escape the import of the lack of scientific basis for the 100-foot flood plain rule, the majority rely upon the

"presumption" that all legislative enactments are valid. As one judge has said, presumptions are the bats of the law; they disappear in the sunlight of evidence to the contrary, or the showing of no foundation for their existence.

Nor is "judicial deference" to the legislating body any excuse for upholding a baseless regulation. Courts should jealously insist on the right to examine judicially the actions of public bodies without and deferment or subordination of judicial function to other branches of government.

This dissenter was the author of the opinions in *Knight v. City of Billings* (1982), 197 Mont. 165, 642 P.2d 141, and *Western Energy Co. v. Genie Land Co.* (1987), 227 Mont. 74, 737 P.2d 478. The majority attempt to distinguish *Knight*, where the plaintiffs suffered a 30 percent loss in the value of their properties, on the basis that here the plaintiff still has a possibility of use for her property. *Knight* cannot be so distinguished, for even there the plaintiffs still had use of their properties as residences. Here, the plaintiff is severely limited in the use of her property under the 100-foot flood plain rule. Her only possibility is to build 1200 to 1400 feet back from the river, or to undertake very expensive devices for sewage disposal. *Western Energy* is not in accord with this decision. *Western Energy* was not a "taking" case. It related to the due process implication of the regulation

involved.

I find no evidence in the record which translates to a basis that the 100-foot flood plain set-back rule is substantially related to the public health. Under the record here, that rule could have been set at 30 feet or a mile. Either is a justifiable here as the 100-foot rule. No studies support the regulation. I therefore dissent and would reverse and remand for judgment in favor of the plaintiff.

John C. Sheehy
Justice

B.1.

MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY

* * * * * * * * * * * * * *

MARY W. McELWAIN, Cause No. DV-88-344A

Plaintiff,

vs.

THE COUNTY OF FLATHEAD,
political subdivision of
the State of Montana,

Defendant.

* * * * * * * * * * * *

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

* * * * * * * * * * * *

This cause was heard in open court on the 20th and 21st days of September, 1989, before the Honorable Leif B. Erickson, District Judge, sitting without a jury. Plaintiff was represented by Marshall Murray and Leonard L. Kaufman of the firm of Murray, Kaufman, Vidal, Gordon & Ogle, P.C., and Defendant was represented by Thomas J. Murphy of the firm of Conklin, Nybo & LeVeque, P.C. Oral and written evidence was presented by the parties to the Court in support of their respective contentions and the Court, having also considered all the applicable law thereto, makes the following:

FINDINGS OF FACT

1. The Defendant is the County of Flathead, a political subdivision of the State of Montana.

2. Mary W. McElwain was at all times mentioned, and is, a resident of Butte, Silver Bow County, Montana. On October 24, 1979, for the sum of $52,500.00, she purchased that certain real property located in Flathead County, Montana, more particularly described as follows:

> That portion of the Southeast Quarter, Section 4, Township 27 North, Range 20 West, P.M.M., Flathead County, Montana, described as follows:
>
> Commencing at the East Quarter corner of Section 4;

thence along the East line of the Southeast Quarter, Section 4, South 0°37'00" East 2060.25 feet to the Point of Beginning; thence retracing along the East line of the Southeast Quarter North 0°37'00" West 310.43 feet; thence South 89°41'10" West 2011.66 feet, more or less, to the low water mark of the Flathead River; thence Southeasterly along the low water mark 370.00 feet, more or less, to a point which bears South 89°23'00" West from the Point of Beginning; thence North 89°23'00" East 1856.02 feet, more or less, to the Point of Beginning, containing 14.08 acres of land, more or less, all as shown on Certificate of Survey #5286.

RESERVING THEREFROM a 30.00 foot road and utility easement over the Easterly 30.00 feet thereof.

SUBJECT TO: Reservations and exceptions by the Montana Power Company recorded December 9, 1946 in Book 278, page 47, records of Flathead County, Montana.

SUBJECT TO: Declaration of Covenants, Conditions and Restrictions recorded November 8th, 1979, in Book 682, page 251, records of Flathead County, Montana.

3. The purpose of the purchase was to acquire a building site for a retirement home to be located approximately 200 feet from the Flathead River.

4. At the time of purchase Plaintiff, through her husband Joseph W. McElwain, made inquiry as to the use of the property as a residential home site, taking into account amenities of the Flathead River. In this respect Plaintiff engaged the services of Calvin S. Robinson, Esq., of the Murphy, Robinson, Heckathorn and Phillips law firm, Kalispell, Montana, obtained a title insurance policy in the sum of $52,500.00, and obtained a warranty deed to the property. The transaction was handled by Trails West Realty. The property had recently been surveyed as shown on Certificate of Survey No. 5286, Records of Flathead County, Montana, which was duly approved by the then serving County Surveyor and was exempt from state regulations and, in fact, was not submitted to the State of Montana for any review or submittal purposes. At the time of this purchase, said property was subject to then existing regulations for subsurface sewage treatment systems, effective 1975. These regulations are found in Plaintiff's Exhibit 1A, incorporated herein by reference. These regulations made it unlawful for any person to construct or alter an individual sewage disposal system within the county without first

obtaining a valid permit issued by the health officer for the specific construction proposed. The regulations further set forth certain setback requirements as well as septic tank capacity, minimum absorption area standards, type and quality of material used for construction of the septic system, and so forth. In addition, it authorized the County Board of Health, in order to protect the health and safety of county residents and the general public, to promulgate and amend from time to time regulations establishing minimum standards governing the design, construction and installation of individual sewage disposal systems. Nowhere in the regulations is there a setback requirement from a flood plain. No evidence has been introduced that the County Board of Health established any minimum standards relative to the design, construction and installation of individual sewage disposal systems. In addition to the Flathead County regulations for subsurface sewage disposal systems the County adopted Resolution No. 204 on September 2, 1975 and Resolution No. 205(A) on September 8, 1975. These are Plaintiff's Exhibits 2 and 3, respectively, and are likewise incorporated herein by reference. Resolution No. 204 was a statement of intent by the Board to require recognition and evaluation of flood hazards in all official actions relating to land use in the flood plain areas having special flood hazards

and vesting the Flathead County Surveyor's Office with the responsibility and authority to identify and map flood hazard and flood plain areas. Resolution No. 204 did not place any restrictions on building within flood plain areas.

Resolution No. 205(A) established interim flood plain zoning districts and zoning regulations within those districts, resolved that the boundaries of flood plain districts shall include all areas designated as flood prone areas on the F.H.B.M. for Flathead County as prepared by the Department of Housing and Urban Development and set forth specific zoning regulations applicable within the flood plain districts as follows:

1. Permits issued by Flathead County.
2. Buildings to be anchored.
3. First floor to be two feet above 100-year flood elevation.
4. Material used to be reasonably flood resistant.
5. Sewage and pipe line systems to be reasonably flood resistant.

The foregoing Exhibits 1A, 2 and 3 constitute all of the rules or regulations offered into evidence which would have any bearing on the question of installation of a septic system on the McElwain property up to the date of purchase of the property. The McElwain property thus would have

been subject to a 100-foot setback from Flathead River pursuant to the Flathead County Regulations for Subsurface Sewage Disposal Systems, Exhibit 1A, at page 6, as well as the aforementioned itemized regulations from Resolution No. 205(A) identified as Plaintiff's Exhibit 3. By complying with the aforementioned regulations the McElwains would have been able to build their home substantially as originally contemplated including a setback of 200 feet from the edge of Flathead River.

5. On August 6, 1984, the Defendant adopted Resolution No. 522 cited as the Flathead County Flood Plain Regulations and adopted official Flood Plain Maps which included the Plaintiff's property within the flood plain.

6. On August 23, 1984, the Plaintiff applied for a permit to install a below-ground septic system on said property in order to commence construction of a retirement home. Her application was denied on the grounds that all of her property was in or within 100 feet of the 100-year floor plain as designated by the Federal Emergency Management Agency (F.E.M.A.) flood plain maps.

7. Plaintiff then hired a civil engineer and proved that a portion of her property was outside of said flood plain.

8. On July 18, 1986, the Department of Natural Resources and Conservation of the State of Montana

determined that a portion of the McElwain property was considered out of the flood plain and this was agreed to by the Flathead County Flood Plain Manager on July 21, 1986.

9. After the Plaintiff proved that a portion of her land was not within the flood plain Plaintiff reapplied, on November 6, 1986, for a below-ground septic system permit. Said application was denied on November 7, 1986, on the grounds that, "Flathead County Regulations for Sewage Treatment Systems, Section 8.2D, requires a 100-foot setback between the septic system drain field and the 100-year flood plain. The flood plain maps indicate that this separation cannot be attained on your property so, consequently, we must deny the request for a permit." As proposed by Plaintiff, her drain field would have been 80 feet away from the flood plain.

10. Plaintiff then requested a variance for the 20 feet involved. The request for her variance was finally denied on May 13, 1988:

> ...[The Defendant] will be able to issue a permit for a mounded septic system as of May 1, 1988. Given the nature of the parcel, we suggest that the entire house be elevated to allow for a gravity flow sewage treatment system with the bottom of the drain field at least four (4) feet above the 100 year flood elevation.

> If Mrs. McElwain wishes to pursue this avenue, please let us know so we can discuss the method of elevating the site and the size that would be required. The above proposal is the only one that I may permit...

10. Plaintiff appealed the denial of her variance request instituted on November 6, 1986, through the entire administrative process.

12. The plans which were denied contemplated a drain field for a four-bedroom home. Testimony at the hearing revealed that Plaintiff had initially contemplated a three-bedroom home and a properly designed drain field for a three-bedroom home could have been configured to fit within the land available to Plaintiff without encroaching on the 100-foot setback from the 100-year flood plain without mounding.

13. There are principally two setback regulations involved in this case. The first regulation is the 100-foot horizontal setback from drain field to 100-year flood plain. The second setback rule is the four-foot vertical setback rule. The four-foot separation rule is, in practice, a waiver provision to the 100-foot setback rule. If a property can meet the four-foot setback "waiver," then the 100-foot setback rule will not apply. The four-foot vertical setback waiver

provision is found at §16.16.304(15)(b) A.R.M. (1984). This regulation states that a waiver from the 100-foot horizontal setback rule can be obtained if two conditions are met: First, the drain field is over 100 feet from the high water mark of the nearest open water (clearly met by the McElwains), and second, there must be a four-foot vertical separation between the bottom of the drain field and the 100-year flood elevation. This vertical separation can be created through a mounded system. The four foot vertical separation rule was adopted because several studies showed that a two- to four-foot separation through unsaturated ground would provide reductions of pathogens and organics. However, this reduction of pathogens and organics would not occur during a flood if the ground was saturated. Therefore, the subsurface sewage system must be outside of the flood plain to insure effective sewage treatment.

14. The purpose of these setback regulations is to protect the health, welfare, and safety of the public by requiring a reasonable distance between sewage drain field and flood plain to allow the soil to cleanse sewage effluent. Setback regulations insure the cleansing of sewage effluent in four ways: Microbial degradation (hostile environment), filtration, dilution, and absorption. It is generally true that the larger the soil separation (setback), the better the

treatment of sewage effluent accomplished by the soil. These functions occur most effectively during the vertical flow-treatment of effluent; however, three of the treatment functions continue during the horizontal movement of sewage effluent (after the effluent reaches groundwater). These three treatment functions accomplished by horizontal treatment include: Decomposition (hostile environment), filtration, and dilution. The horizontal treatment of effluent by soil is therefore an important part of the overall treatment of sewage effluent. This cleansing by the soil must occur or the public will be endangered by such contaminants.

15. The Defendant argues that the Plaintiff's husband, Joe McElwain, is a lawyer and former Chairman of the Board of Montana Power Company and in such capacity knew or should have known of the need to obtain a sewage system permit on the subject property. Further, that had he adequately reviewed applicable sanitation requirements he would have discovered the restrictions on use of the property. The facts do not support this premise insofar as the regulations in existence in 1979, previously noted as Plaintiff's Exhibits 1A, 2 and 3, would not have prohibited the construction of a building and installation of a septic system generally as contemplated by the McElwains.

16. Defendant further argues that had the Plaintiff

submitted plans to install either a mounded sewage system or a shallow capped sewage system on her property within that portion of her property which was more than 100 feet outside of the flood plain area that such plans would have been approved and therefore the restrictions on septic systems within 100 feet of the 100-year flood plain have not changed the "residential character" of the property. To accomplish this, however, would require the McElwains to construct their home approximately 1,200 to 1,400 feet back from the high water line of Flathead River rather than 200 fee back as originally contemplated. This is illustrated on Plaintiff's Exhibit No. 10 where the rectangular area marked by this Court as "A" indicates the contemplated building site and the red oval shaped area marked by this Court as "B" as the only portion of the land on which the McElwains would be allowed to construct a building with septic under the 1984 regulations.

17. Expert testimony revealed that if the imposition of the aforesaid servitude and limitations upon the Plaintiff's property had not been involved, the highest and best use of the Plaintiff's property was for use as residential property with a building site about 150 to 200 feet from the west boundary, utilizing the amenity of the Flathead River. Said property, free and clear of the servitude and limitations

imposed by Flathead County of September 5, 1984, would have a fair market value of $75,000.00, both at said time and as of the date of May 13, 1988, the date of final exhaustion of all administrative procedures.

18. The adoption and imposition of the said servitude and limitations upon the Plaintiff's property has reduced its fair market value to $25,000.00 because Plaintiff is not able to utilize the property nor in any fashion take advantage of the amenities of its location on the shores of the Flathead River, as was her intended use. Thus, Plaintiff has suffered damages to her property of a permanent and irreparable nature by means of the diminution of value of the property, based upon fair market value, in the sum of $50,000.00.

19. Whereas evidence was presented during the course of the hearing as to the reasonableness of the regulations relative to the setback requirements for subsurface sewage systems at the time of the McElwains' application in 1984, the primary thrust of the McElwains' Complaint is for the imposition of a servitude upon the property rather than whether this Court should deem such regulations unreasonable. The Court further finds in light of the testimony offered that although there is a divergence of opinion as to the specific setback requirements necessary to

meet public health standards that there can be no question that the regulations adopted will meet those public health standards and are reasonably designed to do so.

Based on the foregoing Findings of Fact the Court enters the following:

CONCLUSIONS OF LAW

1. Insofar as the regulations enacted are intended to protect public health, they are within the police power of the State to enact. *Freeman v. Board of Adjustments*, 97 Mont. 342, 34 P.2d 534 (1934).

2. While conflicting testimony was offered as to the reasonableness of the regulation for the purpose to be served, and that different regulations imposing less restriction on the land might be adopted which would provide comparable health protection using an engineered system and monitoring, the burden of overcoming the presumption that the regulations as adopted were reasonable has not been met by Plaintiff. See, *Whistler v. Burlington Northern Railroad Company*, ____Mont.____, 44 St.Rep. 1415, 1418 (1987).

3. Although the regulations in question impose a restriction on the use of a large portion of Plaintiff's property inasmuch as they are reasonably adapted to protection of

public health and safety and injure or impair Plaintiff's property rights only to the extent reasonably necessary to preserve public welfare, they do not constitute a taking of property and, thus, the Plaintiff is not entitled to compensation for the restrictions imposed. *Western Energy Co. v. Genie Land Co.*, 227 Mont. 74, 78, 737 P.2d 418, 481. Also See: *Yellowstone Valley Electric v. Ostermiller*, 178 Mont. 8, 13-15, 608 P.2d 491; *Mugler v. Kansas*, 123 U.S. 623, 668-669, 31 L.Ed. 205, 8 S.Ct. 273; *Penn. Central Transportation Co. v. New York City*, 483 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646; *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L.Ed. 349, 36 S.Ct. 143 (1915); *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962) 16A Am.Jur.2d Const. Law 587; *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378; *First English v. County of Los Angeles*, 258 Cal.Rptr. 893, (Cal.App. 2 Dist. 1989). The Court would further note that the regulations do allow for variances and a hearing board has been established to consider whether a variance should be granted to take into account presumably questions of topography, soil permeability and state of the art treatment systems which will meet the purpose of the restrictions imposed and assure that public waters are not exposed to effluent during 100-year

floods. This Court is aware that Plaintiff sought such a variance and was denied. However, no issue has been raised here as to the appropriateness of the denial of the variance and hence this Court does not address that issue.

JUDGMENT

Let judgment enter accordingly.

DATED this 2nd day of March, 1990

/s/ Leif B. Erickson
District Judge

cc: Marshall Murray
Thomas J. Murphy

B.2.

MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY

* * * * * * * * * * * * *

MARY W. McELWAIN,

Cause No. DV-88-344A

Plaintiff,

vs.

ORDER

THE COUNTY OF FLATHEAD,
political subdivision of
the State of Montana,

Defendant.

* * * * * * * * * * * *

This matter comes before the Court on the motion of Plaintiff filed March 20, 1990 to alter or amend the judgment. Briefs have been filed by the parties. This matter

was inadvertently not brought to the attention of this Court until May 7, 1990 which is beyond the 45 days allowed by Rule 59(g), Montana Rules of Civil Procedure. Because, however, it was not the intent of the Court to permit the motion to be summarily denied this Court has, sua sponte, enlarged the time for ruling on the motion to include sufficient time for entry of this Order.

The Court having considered the motion and briefs and good cause appearing, the motion is hereby denied.

DATED this 9th day of May, 1990.

/s/ Leif B. Erickson
District Judge

RATIONALE

In her brief in support of the Motion to Alter or Amend the Judgment Plaintiff urges this Court to reconsider Conclusion of Law No. 3 which held that although the regulation in question imposed restrictions on the use of Plaintiff's property such restrictions did not constitute a taking. Plaintiff relies primarily on *Less v. City of Butte*, (Mont. 1903), and *Knight v. City of Billings*, ____Mont.____, 642 P.2d 141, 145 (1986). Although not cited in the initial Conclusions of Law this Court carefully considered those two cases as well as numerous other Montana and federal cases which likewise were not cited in the initial Conclusions of Law. The failure to include these cases does not mean they were ignored, rather that they were inapplicable as this Court viewed the facts of the present case.

The key to the analysis here is the nature of the action taken by the State as noted in *Keystone Coal Association v. DeBenedicties*, 480 U.S. 470, 94 L.Ed. 472, 107 S.Ct. 1232, where the Court stated:

> Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis. In *Mugler v. Kansas*, 123 U. S. 623, 31 L.Ed. 205, 8 S.Ct. 273 (1887), for

example, a Kansas distiller who had built a brewery -while it was legal to do so challenged a Kansas constitutional amendment which prohibited the manufacture and sale of intoxicating liquors. Although the court recognized that the "buildings and machinery constituting these breweries are of little value" because of the amendment, Id., at 657, 31 L.Ed. 205 8 S.Ct. 273, Justice Harlan explained that a

> "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not -- and, consistently with the existence and safety of organized society cannot be -- burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being

permitted, by a noxious use of their property, to inflict injury upon the community. Id, at 668-669, 31 L.Ed. 205, 8 S.Ct. 273.

See also: *Plymouth Coal Company,* supra; *Hadacheck v. Sebastian,* 239 U.S. 394, 60 L.Ed. 348, 36 S.Ct. 143 (1915); *Reinman v. Little Rock,* 237 U.S. 171, 59 L.Ed. 900, 35 S. Ct. 511 (1915); *Powell v. Pennsylvania,* 127 U.S. 678, 32 L. Ed. 253, 8 S.Ct. 992 (1882).

See also: *Yellowstone Valley Electric v. Ostermiller,* (Mont. 1980), 608 P.2d 491, 187 Mont. 8, 13.

From the facts in the instant case, as opposed to the facts in *Knight v. City of Billings,* it is clear that the activity prohibited, i.e., a septic system within, or within 100 feet of, the 100-year flood plain is an activity which, if allowed, would be injurious to the health or safety of the community. A perhaps extreme example of a similar type of activity which the State has a legitimate interest in proscribing would be use of land for a hazardous waste dump, particularly where the populous would be somehow exposed to the contents of such a dump. While the contents of s septic system may not equate that of a hazardous waste dump there can be no question that if the contents enter a public

waterway such as the Flathead River, in this instance, that there would be a clear and present danger to those using that waterway.

During the course of the trial the expert witness for the Plaintiff noted that there would be no real detriment to the public waterway were the septic system of the Plaintiff to be flooded since a 100-year flood is already going to include fecal matter and bacteria from both pre-existing septic systems as well as from various pastures through which the water will pass both prior to and after leaving the Plaintiff's property. The fact of other pollution should not, however, stand in the way of efforts to protect the public from new sources of pollution and hence is insufficient to permit this Court to overturn the regulation at issue.

Other matters raised in the Motion to Alter or Amend the Judgment has been addressed in the Findings of Fact and Conclusions of Law and will not be readdressed herein.

cc: Marshall Murray
Thomas J. Murphy

C.

IN THE SUPREME COURT OF THE
STATE OF MONTANA
No. 90-377

MARY W. McELWAIN,

Plaintiff and Appellant,

v.

THE COUNTY OF FLATHEAD,
a political subdivision of
the State of Montana,

Defendant and Respondent.

ORDER

The petition for rehearing is denied

DATED this 2nd day of July, 1991.

/s/ Diane G. Barz

/s/ William E. Hunt, Sr.

/s/ John Conway Harrison

/s/ R.C. McDonough

Honorable John C. Sheehy would grant a rehearing.

D.

IN THE SUPREME COURT OF THE
STATE OF MONTANA
THE OFFICE OF THE CLERK
OF THE SUPREME COURT
HELENA, MONTANA 59620-3003

07/09/91

Marshall Murray, Esq.
Leonard L. Kaufman, Esq.
P.O. Box 728
Kalispell, MT 59901

NOTICE

Case Number 90-377

MARY W. McELWAIN,
Plaintiff and Appellant,

v.

THE COUNTY OF FLATHEAD,
a political subdivision of
the State of Montana,
Defendant and Respondent.

Remittitur for the above named case has been issued on this date.

Sincerely,

ED SMITH
Clerk of the Supreme Court, 215 N. Sanders, Room 323, Justice Building, Telephone (406) 444-3858

E. Section 9.2(5)(a), Flathead County, Montana Regulations for Sewage Treatment Systems

(5) Floodplain -

(a) No soil absorption system shall be located within 100 feet of a 100 year floodplain of any river, lake, stream, pond, or watercourse and from any swamp or seep as delineated by the most current Federal Emergency Management Agency (FEMA) floodplain maps available and accepted for use in Flathead County (see Table 1). The shaded zones as shown on the map shall generally be considered as a guideline in determining the boundary of the 100 year floodplain. In those areas where there are questions due to either the scale of the mapping or variation in topography, the 100 year floodplain boundary shall be determined by the Flathead County Floodplain Administrator. Determinations shall be in writing with supporting documentation and

shall be submitted to the Department by the applicant. A waiver may only be provided if:

i. The watercourse is an irrigation ditch and the groundwater flow at the drainfield site will not enter the irrigation ditch, or

ii. The river or stream average yearly highwater mark is a minimum of 100 feet from the drainfield and the bottom of the drainfield will be at least four feet above the 100 year flood elevation.

RESPECTFULLY SUBMITTED this 30th day of September, 1991.

MURRAY & KAUFMAN, P.C.

By: MARSHALL MURRAY
Marshall Murray
Attorney for Petitioner

Supreme Court, U.S.
FILED
NOV 29 1991
OFFICE OF THE CLERK

(2)

No. 91-549

In The

Supreme Court of the United States

October Term, 1990

MARY W. McELWAIN,

Petitioner,

v.

COUNTY OF FLATHEAD,

Respondent.

Petition For Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THOMAS J. MURPHY
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QUESTIONS PRESENTED FOR REVIEW

1. Does a County take property in violation of the property clause of the United States Constitution, applicable to the states through the Fourteenth Amendment, when it enacts septic system regulations which allow the landowner to construct her home, but require the landowner's septic drain field to be one hundred feet away from the 100-year floodplain?

2. Does the finding of the District Court and the Montana Supreme Court that the septic regulations "as adopted will meet those public health standards and are reasonably designed to do so" equate with or exceed the tests adopted by this Court in its previous taking decisions?

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CONSTITUTIONAL PROVISIONS AND RULES

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STATEMENT OF THE CASE

In an effort to prevent the flow of untreated sewage into the Flathead River, Flathead County enacted sanitation regulations requiring the petitioner, McElwain, to separate by 100 feet her sewage drain field from the 100-year floodplain.

The petitioner purchased property in Flathead County in 1979, and held the property as an investment. Two years after Flathead County adopted floodplain regulations and maps relevant to the petitioner's property, she applied on November 6, 1986, for a below-ground septic system permit. Her application was denied on November 7, 1986, on the grounds that, "Flathead County Regulations for Sewage Treatment Systems, Section 8.2D, requires a 100-foot setback between the septic system drain field and the 100-year floodplain."

The petitioner requested a variance, but her request was denied. However, the petitioner did not raise an issue in the District Court regarding the appropriateness of the denial of her variance request. (Petitioner's Appendix (Pet. App.) B.1 at 3, p. 50.) In fact, testimony at trial revealed that petitioner's civil engineer had improperly submitted the septic system application. It was held that if the petitioner's civil engineer had not made this mistake, her application would have been accepted, and she would have been allowed to build her home without need of a variance. (Pet. App. B.1 at 12, p. 43.) Therefore, petitioner McElwain proceeds here with a facial challenge of Flathead County's floodplain regulation.

The petitioner contends that Flathead County did not substantiate the need for the 100-foot setback rule. (Petition pp. 9-10.) In actuality, every expert who testified, including the petitioner's experts, attested to the cleansing propensities of the soil barrier created by the setback regulation. Petitioner's civil engineer admitted that a 100-foot soil barrier provided four valuable treatment functions: Absorption, filtration, microbial degradation, and dilution (Transcript, pp. 119-121). Therefore, the petitioner is incorrect in contending that "the County presented no factual basis to support the need for its setback regulations." (Petition, p. 9.) In truth, the petitioner could not and did not dispute the scientific evidence and testimony presented which establish the floodplain setback regulations substantially advance the County's legitimate interest of protecting its citizens from untreated sewage.

The petitioner's hydrologist, Mr. Spratt, also enumerated the same four treatment functions of soil (Transcript, pp. 261-262). Mr. Spratt conceded that the treatment function occurs while sewage effluent moves horizontally through a 100-foot soil barrier created by the setback regulations (Transcript, p. 262, line 20). Mr. Spratt acknowledged the many studies discussed at trial which document the horizontal underground travel of viruses from septic systems (Transcript, p. 264, line 19). Mr. Spratt recognized that setback requirements are not standardized because of different soils and hydrologic conditions (Transcript, pp. 241-242). This, he admitted, invites the county's legislative body to tailor a horizontal setback regulation suitable for the conditions in Flathead County (Transcript, p. 247, line 7).

Flathead County called, by deposition, Dan Frazier from the Montana Department of Health and Environmental Sciences, to describe the purpose of the 100-foot setback regulation:

> . . . to protect public health and the quality of state waters . . . Sewage can obviously have a lot of contaminants in it. Many of those are organic contaminants, pathogens which can cause water-borne disease when they enter the groundwater or surface waters that are used by people as sources of drinking water. . . . Nutrients like nitrogen and phosphorous are found in sewage. Those can have an impact on groundwater quality when they reach surface waters. They can, if they are the limiting factors, cause algae blooms in streams and lakes.

(Frazier testimony, by deposition, p. 9, line 3.)

Mr. Frazier also discussed another important reason for the 100-foot setback rule: "Floods can be expected to have fairly long duration; and in those cases, that floodplain is going to be inundated in water for an extended period of time." (Frazier deposition, p. 10, line 11.) During a flood, a submerged sewage drain field does not treat effluent. A submerged drain field allows effluent to be freely introduced to the flood waters.

Mr. Frazier cited several scientific studies determining the horizontal underground movement of contaminants found in sewage effluent. These studies helped the State of Montana and Flathead County to decide where, in relationship to the floodplain, to set back sewage drain fields. Mr. Frazier related four instances studied by the University of Wisconsin wherein sewage drain fields

were spiked with virus particles. These particles were then monitored in nearby wells. Some virus particles traveled as far as 150 feet from the disposal site (Frazier depo., p. 11, line 21). These studies indicated to Flathead County and the State of Montana that regulations are needed to horizontally separate the dumping point of sewage effluent from other water sources such as rivers and floodwaters.

Flathead County also called its environmental health specialist, Drew Paslawsky. Mr. Paslawsky confirmed that the purpose behind the 100-foot setback rule is to minimize water pollution. Mr. Paslawsky testified that if septic drain fields are flooded, sewage effluent may flow to the ground surface or back into the structure (Transcript, p. 279, line 13).

Mr. Paslawsky explained why Flathead County needed a horizontal setback requirement:

> During the 100-year flood on the McElwain property, if we have a conventional drain field installed there, the flood-waters and associated ground water table will inundate the bottom of the drain field and essentially you lose all of that benefit of that vertical, unsaturated treatment. You then are left with the only treatment being horizontal treatment through the soil, where organisms will die off due to the hostile environment, filtration, and dilution. That is the only setback we have that will provide any benefit to protect the floodwaters, to keep the sewage out of them. And likewise, to prevent the system from backing up into the house.
>
> And therefore, when you look at studies done on the movement of micro-organisms through

> groundwater aquifers, in most of the studies, on a majority of the soils in the study, have found that the micro-organisms are removed after about 100, 150 feet of travel through the aquifers. So it is a fair and just setback rule, that 100-foot rule. It encompasses most of the situations we are dealing with.

(Transcript, pp. 340-341.)

The District Court made three specific findings directly relevant to the issue of this appeal:

> [R]eduction of pathogens and organics would not occur during a flood if the ground was saturated. Therefore, the sub-surface sewage system must be outside of the flood plain to insure effective sewage treatment. (Pet. App. B.1. at 13, p. 44.)

> The purpose of these setback regulations is to protect the health, welfare, and safety of the public by requiring a reasonable distance between sewage drain field and flood plain to allow the soil to cleanse sewage effluent. Setback regulations insure the cleansing of sewage effluent in four ways: Microbial degredation (hostile environment), filtration, dilution, and absorption. It is generally true that the larger the soil separation (setback), the better the treatment of sewage effluent accomplished by the soil. These functions occur most effectively during the vertical flow-treatment of effluent; however, three of the treatment functions continue during the horizontal movement of sewage effluent (after the effluent reaches groundwater). These three treatment functions accomplished by horizontal treatment include: Decomposition (hostile environment), filtration,

> and dilution. The horizontal treatment of effluent by soil is therefore an important part of the overall treatment of sewage effluent. This cleansing by the soil must occur or the public will be endangered by such contaminants. (Pet. App. B.1. at 14, pp. 44-45.)
>
> . . . The Court further finds in light of the testimony offered that although there is a divergence of opinion as to the specific setback requirements necessary to meet public health standards that there can be no question that the regulations as adopted will meet those public health standards and are reasonably designed to do so. (Pet. App. B.1. at 19, pp. 47-48.)

The District Court's finding that sewage drain fields must be outside of the floodplain to insure adequate effluent treatment led it to conclude the setback regulation as adopted "will meet" the health objectives of Flathead County. The District Court therefore upheld the regulation as a valid exercise of the County's police power without need of compensation. After McElwain submitted a petition for rehearing, the District Court further extrapolated:

> [I]t is clear that the activity prohibited, i.e., septic system within, or within 100 feet of, the 100-year flood plain is an activity which, if allowed, would be injurious to the health or safety of the community. A perhaps extreme example of similar type of activity which the State has a legitimate interest in proscribing would be use of land for a hazardous waste dump, particularly where the populous would be somehow exposed to the contents of such a dump. While the contents of a septic system may not equate that of a hazardous waste dump there can be no

> question that if the contents enter a public waterway such as the Flathead River, in this instance, that there would be a clear and present danger to those using that waterway.

(Pet. App. B.2. at pp. 55-56.)

McElwain appealed to the Montana Supreme Court arguing that the District Court did not specifically find the setback regulation "substantially advanced" a legitimate state interest. Citing its previous taking decisions, the Montana Supreme Court affirmed the District Court and held that its usage of the term "reasonable" is a "standard of equivalent merit and significance to the federal standard of 'substantial'." (Pet. App. 1, p. 22.)

The Court said:

> A review of the record shows the evidence supports a finding that the regulation is substantially related to the legitimate State interest of protecting public health and safety. Requiring a reasonable distance between sewage drainfields and the 100-year flood plain in order to allow adequate soil cleansing of the sewage prevents the public from the endangerment of sewage contaminants. The testimony supported a conclusion that 100 feet was a reasonable distance. In the event of a 100-year flood this regulation helps make certain the river will still be adequately protected from septic systems that comply with these regulations. It is appellant who has failed to show that some distance less than 100 feet would be just as effective in cleansing the sewage. The facts here as applied to the standard to be met indicate a clear substantial relation to the interest of preventing water contamination.

(Pet. App. A., p. 27.)

Finally, in commenting on the minimal impact of the setback regulation on petitioner, the Court held:

> The evidence indicates appellant is still able to utilize the property for the purposes originally intended, that of building [a] home in which to retire, although not as near the river as appellant would have liked. The evidence also reveals the fact that other options are available to appellant. A mounded septic system could be constructed which would allow the appellant more discretion in a building site.
>
> . . .
>
> We hold that the public interest involved here outweighs the encroachment upon appellant's property. As was stated in *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322, 325:
>
> > Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

(Pet. App. A., pp. 29-30.)

SUMMARY OF ARGUMENT

The petitioner has misstated the two most determinative facts. Whereas, the petitioner contends she has been prevented from building a home on her land (Petition,

pp. 8-9), the record below clearly indicates that the petitioner may, at any time, build her home on her property. As established at trial, the denial of the petitioner's application for a sewage system permit was caused solely by the error of her civil engineer in submitting a faulty application. Secondly, the petitioner, in an attempt to wish away the undisputed scientific basis of the setback regulation, fails to inform the Court of the many studies and experts presented at trial which demonstrate that Flathead County's sewage drain field setback regulation does substantially advance the County's legitimate interest of protecting the health and safety of its citizenry.

The trial court's finding that the setback regulation "will meet" the objectives of the County in protecting the public is a finding which meets or exceeds this Court's "substantially advance" test enunciated in *Agins v. Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980).

This Court should not grant a writ of certiorari pursuant to Rule 10(c), Rev. Rules, S. Ct., because the Montana Supreme Court has not decided a federal question in a way that conflicts with applicable decisions of this Court. The Montana Supreme Court's decision paid full recognition of this Court's takings precedent, and explicitly found that its decision was in accord with U.S. Supreme Court precedent.

Due to the mistake of the petitioner's civil engineer, there was neither a "meaningful application" nor a "final decision" regarding the petitioner's sewage drain field permit. Therefore, this Court may determine that petitioner's claim is not ripe for adjudication.

Finally, the petitioner's arguments disregard the conduct from which she is prohibited. Petitioner seeks to dispose of her sewage in a way which would, in the opinion of the trial court, create a "clear and present danger" to the community. This case, therefore, is controlled by the narrow line of nuisance cases, which mandate that no taking has occurred.

ARGUMENT

I. The Montana Courts' Holding Exceeds The Requirements Of The Takings Tests Established By This Court.

Contrary to the petitioner's assertion, the 100-foot setback regulation does substantially advance the County's legitimate goal of keeping sewage out of the Flathead River. The trial court found the regulation did more than merely advance the County's goal:

> [T]here can be no question that the regulations as adopted will meet those public health standards. . . .

(Pet. App. B.1. at 19, p. 48.)

The reason for the lower court's certainty is that the harm to be prevented, *i.e.*, sewage from a drain field placed too close to the floodplain, was the exact activity which was restricted. Extensive expert testimony established the need to set back sewage drain fields from flood-prone areas. This setback guarantees that the sewage effluent will be treated in the soil and that the sewage will stay out of the river during a flood. The legislature

selected a 100-foot setback, because studies showed 100 feet to be an average distance of travel for some components of sewage effluent such as viruses. Therefore, the trial court found the nexus between the County's interest in protecting against sewage contaminants and the regulation to be well matched. If anything, the trial court's finding exceeded the tests enunciated by this Court in its takings decisions.

This Court examined the required nexus between a regulation's purpose and function in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987). In *Nollan*, Justice Scalia, writing for the majority, said:

> [O]ur cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the State interest satisfies the requirement that the former "substantially advance" the latter.

Nollan, 107 S.Ct. at 3146-47. Then, because a permanent physical occupation of land was required, Justice Scalia closely examined whether the terms of the condition fit the California Coastal Commission's purpose in requiring the condition. *Id.* at 3148.

Here, there is no required conveyance or physical invasion; nevertheless, if scrutinized under the *Nollan* nexus test, the regulation in question does fit with its legitimate purpose. The setback regulation prevents the petitioner from dumping her sewage too close to the river. A setback rule, quite likely, is the only way to accomplish this task. Therefore, it is submitted that certiorari, if granted, would not place before the Court a

state court decision which fails to follow this Court's precedent; but rather, would show that the decision of the Montana Supreme Court exceeded the requirements established by this court.

II. Certiorari Should Not Be Granted Because The Montana Courts Have Not Decided A Federal Question In Conflict With This Court's Precedent.

Rule 10(c), Rev. Rules, S. Ct., indicates the character of reasons that will be considered in a review of a petition for writ of certiorari. This rule states, in relevant part that certiorari may be granted:

> When a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

Here, the petitioner cannot show a conflict between this Court's precedent and the lower court decisions. At best, petitioner establishes that the trial court applied a higher standard than required. The petitioner points to a semantical difference rather than the substance of the case. Full analysis reveals that the Montana courts not only followed the established tests, but exceeded those tests.

III. The Petitioner Exaggerates The Impact Of The Setback Regulation.

The petitioner portrays the impact caused by the regulation as much more dramatic than what she actually suffered. Petitioner states that:

> As found by the trial court, the setback regulations adopted by the County constitute a substantial servitude on Mrs. McElwain's land, preventing her from making use of the land as a site for her home.

(Petition, pp. 8-9.)

The trial court made no such finding. The record clearly reveals that the trial court and the Montana Supreme Court found the petitioner may still build on her property:

> The evidence indicates [petitioner] is still able to utilize the property for the purposes originally intended, that of building [a] home in which to retire, although not as near the river as [petitioner] would have liked.

(Pet. App. A., p. 29.)

Whereas the petitioner attempts to lure the Court to consider this case as a total taking of her property, in truth, the petitioner may build her home with a sewage drain field at any time.

Testimony at trial revealed that petitioner's civil engineer improperly submitted the septic system drain field plans. It was held that if the petitioner's civil engineer had not made this mistake, her original application would have been accepted, and she would have been allowed to build her home without need of a variance. (Pet. App. B.1. at 12, p. 43.)

IV. Petitioner's Case May Not Be Ripe For Adjudication By This Court.

The discovery, at trial, that the petitioner may build her home without need of variance, raises a question of the ripeness of this suit. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985), this Court set forth a two-part test to determine the ripeness of a taking dispute. Specifically, this Court required the petitioner to establish that a "final decision" had been made by the relevant legislative body. Here, with the revelation at trial that the petitioner's permit application would have been accepted, if properly submitted, the petitioner cannot meet the first prong of the *Williamson County* test. Furthermore, it is doubtful whether the petitioner can establish that she has presented a "meaningful" application as required by *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352, n. 8, 91 L.Ed.2d 285, 106 S.Ct. 2561, 2566 (1986).

A ripeness challenge goes directly to this Court's subject matter jurisdiction under the case or controversy clause of Article III of the Federal Constitution. See, *Unity Ventures v. County of Lake*, 841 F.2d 770, 774 (7th Cir.), *cert. denied*, 488 U.S. 891, 109 S.Ct. 226 (1988).

Since ripeness is jurisdictional, it may possibly be raised, *sua sponte*, in the appeal of this case. See, *e.g.*, *Hammond v. Baldwin*, 866 F.2d 172 (6th Cir. 1989). Such a result would, again, prevent the Court from rendering a final opinion. Respondent points out this flaw in the petitioner's case pursuant to the requirements of Rule 15.1, Rev. Rules, S. Ct.

V. Flathead County Is Entitled To Prevent The Petitioner From Creating A Nuisance.

The petitioner also glosses over the fact that, as found by the lower court, the prohibited conduct is a nuisance:

> [I]t is clear that the activity prohibited, i.e., a septic system within, or within 100 feet of, the 100-year floodplain is an activity which, if allowed, would be injurious to the health or safety of the community. . . . There can be no question that if the [sewage drain field] contents enter a public waterway such as the Flathead River, in this instance, that there would be a clear and present danger to those using that waterway.

(Pet. App. B.2., pp. 55-56.)

This Court has often addressed the need to allow legislative bodies to enact regulations to prohibit activities akin to nuisances. The preclusion of nuisances has not been found to be a compensable event. *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486, 491-492, 60 L.Ed. 396, 36 S.Ct. 206 (1916). This Court, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L.Ed. 472, 107 S.Ct. 1232 (1987), pointed out that "a state need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Id.* 480 U.S. at 492, n. 22, 107 S.Ct. at 1246, n. 22.

In dissenting from the majority opinion in *Keystone*, Chief Justice Rehnquist, joined by Justices Powell, O'Connor, and Scalia, reaffirmed the nuisance exception:

> [W]e have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use. (Citations omitted.)

Keystone, 480 U.S. at 511 (Rehnquist, C. J., dissenting).

However, Chief Justice Rehnquist described the nuisance exception as a "narrow exception allowing the government to prevent 'a misuse or illegal use.' [Citations omitted.] It is not intended to allow 'the prevention of a legal and essential use, an attribute of its ownership.' " *Id.* at 512 (Rehnquist, C. J., dissenting).

The *Keystone* dissent set forth two "narrowing principles" to the nuisance exception:

> First, nuisance regulations exempted from the Fifth Amendment have rested on discrete and narrow purposes. . . .
>
> Second, and more significantly, our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.

Id. at 513 (Rehnquist, C. J., dissenting).

The nuisance cases, no matter how narrowly construed, apply here. In the present case, Flathead County used its police power to prevent a landowner from dispensing her sewage in a way which injures others.

Dumping sewage is a particular activity that, if not done properly, is illegal. The regulation is drafted in very narrow terms to achieve the particular purpose of protecting the floodplain zone along the Flathead River. Most significantly, the impact is minimal. The petitioner may still build her home with a septic system on her property. Therefore, the nuisance exception applies, and no taking is established.

> As pointed out in the *Keystone* dissent:
>
> [T]he Fifth Amendment . . . is designed to prevent "the public from loading upon one individual more than his just share of the burdens of government." . . .

Id. at 512 (Rehnquist, C. J., dissenting); see also, *Connolly v. Pension Benefit Guar. Corp.*, 106 S.Ct. 1018, 1027, 89 L.Ed.2d 166, 475 U.S. 211 (1986) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S.Ct.1563 (1960). Here, the 100-foot setback regulation is not for the benefit of adjoining land, public use, or to enhance the County's resource position. The 100-foot setback regulation was enacted to prevent property owners in flood-prone areas from dumping their own sewage effluent in a way that hurts others. Flathead County does not gain a public use; rather, it restricts the petitioner from dumping her sewage in order to protect the public. As to petitioner McElwain's sewage, there is no one else in Flathead County who can share in her burden of properly dispensing it.

Justice Scalia reaffirms that it might be an improper end of regulation to single out a given landowner to bear a greater regulatory burden than the regulatory problem

caused by that landowner. *Nollan*, 107 S.Ct. at 3147, n. 4. Here, the landowner is only being asked to bear the burden caused by her own sewage.

VI. The County's Interest In Preventing This Nuisance Outweighs The Petitioner's Right To Build Closer To The River.

This Court has rejected the two extreme positions in takings law. As a result, government cannot regulate every attribute of land, nor can the landowner treat her land in ways repugnant to a modern society. Therefore, in *Keystone*, this Court indicated that takings analysis "necessarily requires a weighing of private and public interests." *Keystone*, 480 U.S. at 492. If this Court applies a balancing test to the facts established in the record, Flathead County should prevail. The petitioner's interest in building 100 feet closer to or within the floodplain is minimal. The petitioner not only jeopardizes others with her raw sewage, but she also subjects her own home to flooding and sewage backup during a flood. The petitioner's right to maintain this nuisance does not outweigh the County's desire to protect the public from sewage. The setback regulation represents an effort on behalf of Flathead County to prevent raw sewage from finding its way into the Flathead River. The petitioner's sewage endangers the public health, welfare, and safety. Raw sewage is a nuisance which cannot be tolerated in this modern era. The petitioner wants to build a house closer to the river. A balancing test applied to these circumstances clearly establishes that the County's interest is greater than the petitioner's. Therefore, the

County's 100-foot setback regulation should be upheld, and the petition for writ of certiorari denied.

CONCLUSION

For the reasons presented above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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